Supreme Court, U.S.
FILED
OCT 13 1992
OFFICE OF THE CLERK

No. 91-7358

In The

Supreme Court of the United States

October Term, 1992

TODD A. BRECHT,

Petitioner,

v.

GORDON A. ABRAHAMSON, SUPERINTENDENT, DODGE CORRECTIONAL INSTITUTION,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Seventh Circuit

REPLY BRIEF FOR PETITIONER

ALLEN E. SHOENBERGER
(Appointed by this Court)

Loyola Law School
1 E. Pearson
Chicago, Illinois 60611
(312) 915-7141

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

Question Presented

Whether, when considering violations of *Doyle v. Ohio* in federal habeas corpus proceedings, it is consistent with constitutional due process and the Sixth Amendment right to trial by jury to abandon the standard of review of whether constitutional error was harmless beyond a reasonable doubt and substitute the standard of whether the error substantially affected the course of the trial.

TABLE OF CONTENTS

Page

Table of Authorities iii

Statement of the Case – a Reply 1

The Limited Grant of Certiorari: What Isn't at Issue 6

The Question Presented 8

A. The Practice and Experience of This Court and Lower Federal Courts Applying the Chapman Standard Suggest No Change is Justified 8

B. Statutory Interpretation Cases such as Chapman Should be Given Particular Deference, Since Congress Can Overturn a Decision it Considers Incorrect, Unlike Constitutional Decisions 12

The Harmless Error Standard 14

Conclusion 20

TABLE OF AUTHORITIES

Page

SUPREME COURT CASES

Alaska S.S. Co. v. United States, 290 U.S. 256 (1933) 12

Anderson v. Nelson, 390 U.S. 523 (1968) 9

Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940) 13

Bell v. New Jersey and Pennsylvania, 461 U.S. 773 (1983) 12

Burger v. Kemp, 483 U.S. 776 (1987) 11

Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1932) 14

Chambers v. Maroney, 399 U.S. 42 (1970) 9

Chapman v. California, 386 U.S. 18 (1967) ..... *passim*

Cupp v. Naughten, 414 U.S. 141 (1973) 9

Cuyler v. Sullivan, 446 U.S. 335 (1980) 10

Doyle v. Ohio, 426 U.S. 610 (1976) 7, 8, 17, 18

Dutton v. Evans, 400 U.S. 74 (1970) 9

Estelle v. McGuire, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) 11

Estelle v. Williams, 425 U.S. 501 (1976) 9

Francis v. Franklin, 471 U.S. 307 (1985) 10

Francis v. Henderson, 425 U.S. 536 (1976) 9

Harris v. Reed, 489 U.S. 255 (1989) 11

Henderson v. Morgan, 426 U.S. 637 (1976) 9

Hitchcock v. Dugger, 481 U.S. 393 (1987) 11

TABLE OF AUTHORITIES – Continued

Page

Hopper v. Evans, 456 U.S. 605 (1982) 10

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) 13

Jackson v. Virginia, 443 U.S. 307 (1979) 5

Kelly v. Robinson, 479 U.S. 36 (1986) 13

Kimmelman v. Morrison, 477 U.S. 365 (1986) 10

Kotteakos v. United States, 328 U.S. 750 (1948) 8

Loper v. Beto, 405 U.S. 473 (1972) 9

McKaskle v. Wiggins, 465 U.S. 168 (1984) 10

Manhattan Properties v. Irving Trust Co., 291 U.S. 320 (1933) 12

Milton v. Wainwright, 407 U.S. 371 (1972) 9

Moore v. Illinois, 434 U.S. 220 (1977) 9

Mullaney v. Wilber, 421 U.S. 684 (1975) 9

Murray v. Carrier, 477 U.S. 478 (1986) 15

Monell v. Department of Social Services, 436 U.S. 658 (1978) 14

N.L.R.B. v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170 (1981) 11

New York v. United States, 326 U.S. 572 (1946) 15

Parker v. Dugger, 111 S.Ct. 731, 112 L.Ed. 812 (1991) 11

Parker v. Randolph, 442 U.S. 62 (1979) 10

Perry v. Leeke, 488 U.S. 272 (1989) 11

Roberts v. LaVallee, 389 U.S. 40 (1967) 9

TABLE OF AUTHORITIES – Continued

Page

Rose v. Clark, 478 U.S. 570 (1986) 10

Rose v. Mitchell, 443 U.S. 545 (1979) 10

Rushen v. Spain, 464 U.S. 114 (1983) 10

Sandstrom v. Montana, 442 U.S. 510 (1979) 10

Square D. Company v. Niagara Frontier Thrift Bureau, Inc., 476 U.S. 409 (1986) 13

State of Missouri v. Ross, 299 U.S. 72 (1936) 13

Stone v. Powell, 428 U.S. 465 (1976) 7, 9, 10

Stovall v. Denno, 388 U.S. 293 (1967) 9

Strickland v. Washington, 466 U.S. 668 (1984) 5, 10

Stringer v. Black, 112 S.Ct. 1130 (1992) 11

Teague v. Lane, 489 U.S. 288 (1989) 7, 11

Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474 (1951) 5

Ulster County Court v. Allen, 442 U.S. 140 (1979) 10

United States v. Elgin, J. & E. Ry. Co., 298 U.S. 492 (1936) 13

United States v. Rutherford, 442 U.S. 544 (1979) 13

United States v. Hale, 422 U.S. 171 (1975) 11

Wainwright v. Greenfield, 474 U.S. 284 (1986) 10

Wainwright v. Sykes, 433 U.S. 72 (1977) 9

Whiteley v. Warden of Wyoming Penitentiary, 401 U.S. 560 (1971) 9

TABLE OF AUTHORITIES – Continued

Page

Withrow v. Williams, 91-1030 7

Wright v. West, 112 S.Ct. 2482 (1992) 11

Yates v. Evatt, 111 S.Ct. 1884, 114 L.Ed.2d 432 (1991) 11

OTHER AUTHORITIES

Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 Northwestern L.Rev. 100 (1985) 2

Levi, *An Introduction to Legal Reasoning*, 15 U.Chi.L.Rev. 501 (1948) 13

Report to the Attorney General on Adverse Inferences From Silence, 22 U. Mich. J. of Law Reform 1005 (1989) 15

Supreme Court Rule 14.1(a) 7

Sutherland, *Statutory Construction*, Vol. 2b (5th Ed.) (1992) 13

Rules 8 (c), Rules Governing 2254 and 2255 Cases 12

28 U.S.C. sections 2254 and 2255 12

Pub.L. 94-426, 90 Stat. 1334 12

STATEMENT OF THE CASE – A REPLY

"In this case the only contested issue is whether the death resulted from an intent to kill or a tragic accident." Pet. Br. 5. The dispute is about innocence not acts. Do tainted jury determinations of intent comport with due process? Mr. Brecht continues to maintain that he is innocent of murder and challenges the accuracy of his guilt determination.[1]

The theory of the State of Wisconsin is that a little poison may be all right, but too much will kill and therefore they should be allowed to use a restrained quantity of it and let them be the judge of what quantity they use. The Fifth Amendment does not state that testimony obtained by means of compelled self-incrimination or by the failure of the defendant to incriminate himself may be used and then dispensed with at the whim or will of the prosecution or the trial judge.

The Solicitor General asserts *Doyle* violations concern "nothing more than the admission of truthful evidence regarding the defendant's silence." (Br. p. 17) That displays fundamental confusion about the issue at bar: *Stone v. Powell* was not about truthful testimony regarding illegally seized physical evidence; *Stone* was about admission of the physical evidence, itself. This case is about poisoning a trial by references to post *Miranda* silence. The silence and the use of that silence is at issue; truthful testimony about silence is *not* the issue. "Truthful silence" and "untruthful silence" are grotesque concepts. The use of such silence lies at the core of the Fifth Amendment

---

[1] Relevant jury instructions are at Jt. App. 24-28.

bar on compelling a person to be a witness against himself.[2]

The statement of the case of the State of Wisconsin's brief and the statement of the Solicitor General's brief obscure this single contested issue. Moreover, each brief in its "statement" slants the factual presentation, including subtle error of fact in this Solicitor General's brief.[3] Each brief confuses testimony,[4] argues

---

[2] Statements are different from silence. Grano's discussion of "prophylactic" rules doesn't mention the use of silence in his treatment of *Miranda* issues for a very good reason. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 Northwestern L.Rev. 100, 106-114 (1985). By Grano's definition of prophylactic, the possibility of violating the rule without violating the constitution, no rule about the use of silence can ever be prophylactic. Since prosecutorial use of silence compels speech, whatever questions might lie about Miranda's prophylactic nature or constitutional basis do not arise in the instant case. The relevance of the *Miranda* warning is the formal notice to a person that silence is his right. The core of the Fifth Amendment guarantee against self incrimination is the right to remain silent. Any claim that this court's construction of the word "compelled" in the Fifth Amendment is not "doing constitutional law" borders on the frivolous.

[3] "[F]ound a rifle in their gun cabinet." Solicitor General's brief, p. 1, Jt. App. 99. The rifle is not from a gun cabinet – it was from the bedroom closet of the room in which Todd Brecht slept. Jt. App. 139, para. #3.

[4] "Because petitioner had taken the receiver off the upstairs telephone off the hook, the downstairs telephone was inoperable." Solicitor General's brief p. 1. This confuses which telephone was off the hook. Moreover, the cause of the *downstairs* telephone in the Hartman master bedroom being off the hook (Jt. App. 140, para. 9) was disputed at trial and could have been caused by Roger himself immediately after the shooting.

inferences,[5] and omits significant facts and testimony.[6] Each such misstatement and inference tends to increase

---

[5] For an example of an instance of translating a possible inference into a factual conclusion while implying a witness made statements never made: "horizontal to slightly downward trajectory, a path inconsistent with a claim the weapon had discharged while petitioner was falling." Solicitor General's brief p. 3.

The coroner, Dr. Belau, made no "path inconsistency" remark, although the prosecutor did argue it. Tr. 812. The basis of this argument was an experiment conducted after the preliminary hearing on Dr. Belau's body employing a magic marker, yardstick and carpenter's level. (Tr. 554) The yardstick was lined up with marks made on Dr. Belau's own body and the carpenter's bubble read as "a little bit off." Dr. Belau's conceded possible problems with the experiment both with posture (Tr. 554) and uncertainty in determining the exit wound. (Tr. 552)

[6] For example:

A) The rifle was found outside the house, "suggesting that petitioner had tried to fire another shot." Solicitor General's brief p. 4. This omits Todd Brecht's testimony he attempted to shoot himself, but couldn't get the gun reloaded and threw it down. (See Wisconsin brief at p. 6)

The suggestion is also that Todd Brecht attempted to shoot Roger Hartman again, a suggestion made for the first time only in the prosecutor's final closing argument (Tr. 882-883), although given prominence by the Seventh Circuit opinion. Jt. App. 100. The defense could do little about this belated argument except object, which it did. (Tr. 883) The defense could not discuss the argument's conflict with Roger Hartman's statement he sneaked out of the house, nor its bizarre relationship with the prosecution's elaborate conjectures on premeditation and motive.

B) "The prosecution offered a motive for the killing: petitioner's hostility to Hartman because of the latter's objection to petitioner's homosexuality." Solicitor General brief, p. 4.

The prosecution had clearly represented prior to trial that it would prove through Molly Hartman that her husband's nega-

the likelihood of wrongful intent. These slanted statements present the evidence as if the standard of review

---

tive attitude towards homosexuality had been communicated to Todd Brecht. (Tr. 71-72) No such testimony was forthcoming, quite the opposite. See Tr. 419-421. Molly Hartman also testified that Roger did not condemn or put down Todd, (Tr. 421) there were no arguments, (Tr. 422) it was a good relationship. (Tr. 422) She also testified she knew of no reason Todd Brecht would have wanted to hurt her husband. (Tr. 422)

C) A recitation of statements by Roger Hartman to neighbors appears at p. 4, Wisconsin brief but the recitation omits the contemporaneous statement by Roger Hartman that he didn't know if Todd Brecht had anything against him. (Tr. 164, 175, Pet. Brief 42)

D) "[T]he prosecutor impeached this testimony with letters Brecht had written, with homosexual overtones, to a jail inmate friend in Georgia. . . . " Wisconsin brief p. 7. The first of these two letters was never mailed, Tr. (626-27) the second letter never completed, and consisted of, "Dear Darrell, well here we are" and a date. (Tr. 628-29) The homosexual overtones in the other letter are far from obvious. (Tr. 621-22)

E) Officer Polus testified Brecht said the night he was arrested: "that he didn't mean to shoot anybody and he didn't mean to kill anybody, and later he said he didn't mean for anybody to get murdered." (Tr. 727) (Wisconsin Brief p. 7-8)

In his initial closing argument the prosecutor stated, "Now he was then taken into Winona and they then find the 14 rounds of ammunition on him, and Officer Polus says he hears him talking on the phone to his step father (sic), 'it was a mistake, it was an accident, I didn't murder anyone.' Why murder – a Freudian slip." (Tr. 817) The lengthy quote from Tr 873, at Wisconsin brief p. 8, responds to this argument, and was immediately preceded by, "Did they give Miranda and say Mr. Brecht would you like to make a statement, no they just gave it to him and they left." The quote's last sentence is incomplete (and lacks ellipsis) for it ends: " . . . and I would say, 'I didn't murder anybody,' but that's what it says on the paper that he got: murder." The defense attorney referent for "I would say" was to

rejected by this court in *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 487-88 (1951) were the appropriate standard: it is not, nor can it be so long as questions of innocence remains at the core of habeas.[7]

---

what he would say to the stepfather. The Prosecutor's referent for "I know what I would say" is what he would say to the police.

F) "It was also a condition of Brecht's probation that he was not to . . . leave the state without permission." Wisconsin Br. p. 4. "This suggested Brecht's real plan was to leave Wisconsin in violation of his probation. . . . " Wisconsin Br. p. 7. "It's questionable whether the record supports the proposition that petitioner wanted to leave Wisconsin." District Court opinion, Jt. App. 93.

[7] Wisconsin requests for the first time in its brief to this court application of the standard from *Jackson v. Virginia* 443 U.S. 307 (1979) (Wisconsin Br. 37) a standard developed to evaluate a jury determination untainted by error affecting the deliberative process. It is hard to conceive of a standard more violative of fundamental due process, but by not raising the argument earlier, Wisconsin has waived it. Wisconsin similarly requests application of *Strickland v. Washington* 466 U.S. 668 (1984). Unlike *Jackson* which cannot have been incorporated by reference in the single mention of scope of review below, a footnote on page 30 of Wisconsin's brief to the Seventh Circuit, *Strickland* might be considered as so incorporated, even if awkwardly so. However, as stated in Petitioner's Br. p. 40, none of the policy reasons underlying a standard for testing ineffective assistance of defense attorneys make any sense when the prosecutor inserts error into the trial, for the government is responsible for and can prevent such error. 466 U.S. 693. The heavy burden placed upon habeas petitioners (as well as on direct appeal) by *Strickland* is but one of many examples of how existent rules of law belie arguments that habeas is a rerun of appeal.

The close balance of evidence on the whole record is one obvious reason each court has reversed the preceding judgment, and presumably the reason that the Seventh Circuit found it necessary to change the standard of review.[8] Prosecution misstatements of fact before the jury may ordinarily constitute categorical "harmless error"[9] reflecting only vigorous representation, but such statements on appeal disserve both the function of the appeal process and the grant of certiorari in this case.

The Limited Grant of Certiorari: What Isn't at Issue

The certiorari grant in this case was limited to one question presented, but has become three different ones in the Brief for Wisconsin, changed in substance by the Solicitor General's amicus brief, changed to completely different issues by other amici, (Criminal Justice Legal Foundation, and County of Wayne) and supplemented by yet another question by amici California et al. The issues

---

[8] Only by speculation can one determine the basis of Judge Cudahy's concurrence below, i.e. whether Judge Cudahy concurred by applying the new standard he objected to or by applying the old standard (J.App.128-130), contrary to the Solicitor General's Brief, p. 7, n.3. The district court correctly stated and applied existent harmless error law, Jt. App. 91-92, finding, "the state's references to petitioner's post-*Miranda* silence . . . crucial." "The sole issue for the jury was whether the shooting was accidental or intentional. With the defense hinging on petitioner's credibility, the state's remarks that he simply concocted a 'crazy story' at the time of trial may have been determinative." (Jt. App. 92)

[9] Checked by a combination of the caution that the attorneys' remarks are not evidence (Tr. 775) and the jury's exposure to *all* the evidence.

of whether *Chapman* should be overturned for cases on direct appeal, or whether violations of so-alled "prophylactic" rules invoke article III concerns, were never raised by the State of Wisconsin below, and thus were waived.[10] Neither is presented by the case at bar, which is on collateral review and involves a non-prophylactic rule. Moreover, both issues are barred from consideration by Supreme Court Rule 14.1(a) because neither was raised nor fairly included in the Petition for Certiorari. The attempted presentation of a *Stone v. Powell*, 428 U.S. 465 (1976), question by amici California et al while not as extravagant a claim on the grant of certiorari, is also barred by Supreme Court Rule 14.1(a), and certainly was neither the basis of the opinion for the Seventh Circuit (although mentioned, see Jt. App. 116-19), nor explicitly raised by Wisconsin below (indeed, declined at Wisconsin Brief p. 31, n.6), hence waived as well. Should this court decide that any of the additional amici questions are properly included, Petitioner respectfully requests leave to brief them at a later time.[11]

---

[10] No scope of review issue had been raised in the district court. Jt. App. 135. The argument that a *Doyle v. Ohio*, 426 U.S. 610 (1976), violation is not a constitutional violation is raised for the first time in Wisconsin's brief at 41 and has clearly been waived. Moreover, such a question raises *Teague v. Lane*, 489 U.S. 288, 306-316 (1989) problems, for it seems unfair to confine an accused to direct appeal to raise new constitutional claims, but to permit the state to raise new constitutional claims on collateral review.

[11] The court's attention is directed to Respondent's brief in *Withrow v. Williams*, 91-1030 for a substantive response on the *Stone v. Powell* question.

The Question Presented

The question that *is* properly presented is whether the Seventh Circuit determination to replace the *Chapman v. California*, 386 U.S. 18 (1967), standard on federal habeas considerations of *Doyle v. Ohio* violations with the *Kotteakos v. United States*, 328 U.S. 750 (1948), standard comports with due process, the Sixth Amendment, and section 2254 as interpreted over a quarter of a century by this and other federal courts.[12]

A. The Practice and Experience of This Court and Lower Federal Courts Applying the *Chapman* Standard Suggest No Change is Justified

The Solicitor General notes at Brief p. 12, fn. 7, that the courts of appeals have uniformly held that *Doyle* error is subject to harmless error analysis. Such uniformity only increases the weight and level of justification necessary to change statutory construction that has been applied for decades without any particular indication that the standard was not working.

Moreover, this court as a whole, and indeed, virtually *every* sitting justice over the last quarter of a century, has repeatedly applied *Chapman* on habeas review of state

---

[12] Indeed, the error is so central to the jury decisionmaking process, Petitioner asserts that proper application of the *Kotteakos* standard should cause the writ to issue. (Pet. Br. 36-37, quoting *Kotteakos*, 328 U.S. at 760)

convictions.[13] Such consistent application by both this court and lower federal courts (as well as state courts in

---

[13] *1960s DECISIONS: Stovall v. Denno*, 388 U.S. 293, 306 (1967) (J. Black in dissent would have remanded for consideration under *Chapman*); *Roberts v. LaVallee*, 389 U.S. 40, 44 (per curiam) (1967) (Justice Harlan); *Anderson v. Nelson*, 390 U.S. 523, 524 (1968) (per curiam, "[W]e agree with [the dissenting judge in the Court of Appeals] that comment on a defendant's failure to testify cannot be labeled harmless error in a case where such comment is extensive, where the inference of guilt from silence is stressed to the jury as a basis of conviction, and where there is evidence that would have supported acquittal.")

1970s DECISIONS: Dutton v. Evans, 400 U.S. 74, 90, 108 n.10 (1970) (concurring and dissenting opinions apply *Chapman*, including Chief Justice Burger, and Justices Blackmun, Stewart, Marshall, Black, Brennan and Douglas); *Chambers v. Maroney*, 399 U.S. 42 (1970) (direct review of state habeas, 7 justice opinion for the court applied *Chapman* as did the separate opinion by Justice Harlan); *Whiteley v. Warden of Wyoming Penitentiary*, 401 U.S. 560, 569 n.13 (1971) (dissent by J. Black, C.J. Burger and Justice Blackmun applies *Chapman* test.); *Milton v. Wainwright*, 407 U.S. 371, 378, 382 (1972) (every justice applies harmless error test); *Loper v. Beto*, 405 U.S. 473, 483 n.12, 485 (1972); *Cupp v. Naughten*, 414 U.S. 141, 143 n.2 (1973) (harmless error test not reached, because no error); *Mullaney v. Wilber*, 421 U.S. 684, 705 (1975) (Concurring opinion of Justice Rehnquist joined by C.J. Burger.) *Stone v. Powell*, 428 U.S. 465, 496 (1976) (C.J. Burger for the court, "The operation of the [exclusionary] rule is therefore unlike that of the Fifth Amendment's protection against compelled self incrimination."); *Estelle v. Williams*, 425 U.S. 501, 506-507 (1976) (C.J. Burger opinion cites *Chapman* with approval); *Henderson v. Morgan*, 426 U.S. 637, 647, 650 (1976) (both the opinion for the court by Justice Stevens and separate opinion by Justice White refer to the harmless error standard as appropriate); *Francis v. Henderson*, 425 U.S. 536, 553 n.4 (1976); *Moore v. Illinois*, 434 U.S. 220, 222, 233-234 (1977) (7 Justices remand for application of *Chapman*, Justice Blackmun concurs in Chapman remand.); *Wainwright v. Sykes*, 433 U.S. 72, 97-98,

116-117 (1977) (Justice White concurrence describes what the court does as application of harmless error analysis, dissent by Justices Brennan and White, prejudice in the cause and prejudice test "appears to bear a strong resemblance to harmless error doctrine."); *Parker v. Randolph*, 442 U.S. 62, 70-71 & n.5, 78, 81 (1979); *Rose v. Mitchell*, 443 U.S. 545, 552-59 (1979) (Justice Blackmun for the court rejected Justice Jackson's position that racial discrimination in grand jury selection was always harmless error if the trial jury was untainted. The court also rejected a *Stone v. Powell* argument, 443 U.S. 560-61, and pointed out that the state judges might be too close to the grand jury system to appreciate its defects. 443 U.S. 563. Dissent by Justice Rehnquist, 443 U.S. 587 n.10 "[this] has nothing to do with the guilt or innocence of the prisoner."); *Ulster County Court v. Allen*, 442 U.S. 140, 177 (1979) (dissent by Justice Powell).

1980s DECISIONS: Cuyler v. Sullivan, 446 U.S. 335, 349 (1980); *Hopper v. Evans*, 456 U.S. 605, 613-14 (1982); *Rushen v. Spain*, 464 U.S. 114, 117 n.2, 120, 122, 128 nn.6 & 7 (1983); *Strickland v. Washington*, 466 U.S. 668, 693, 711 (1984); *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8, 198 n.6 (1984); *Francis v. Franklin*, 471 U.S. 307, 325 part III (1985); *Rose v. Clark*, 478 U.S. 570, 582, 588 (1986) (question whether automatic reversal analysis or *Chapman* analysis should apply to jury instructions that violate *Sandstrom v. Montana*, 442 U.S. 510 (1979) (Justice Stevens concurs critical of applying harmless error if constitutional error goes beyond reliability of the guilt or innocence determination, but that is the value being protected in this case. Justice Blackmun in dissent, "When a defendant contests the issue of intent a reviewing court will rarely be capable of deciding whether the error contributed to the verdict; it will have no way of knowing how the jury treated the question of intent."); *Kimmelman v. Morrison*, 477 U.S. 365, 382, 395 n.2 (1986) (*Stone v. Powell* restrictions on habeas held inapplicable to 6th Amendment claims of ineffective assistance of counsel, Justice Brennan for the court, Justice Powell concurs joined by C.J. Burger and Justice Rehnquist); *Wainwright v. Greenfield*, 474 U.S. 284, 290 n.5, 291, 301

their own proceedings) indicate the viability of the *Chapman* standard and are entitled to deference.[14]

(1986) (silence of defendant used to impeach insanity plea) (Justice Stevens' opinion for the court quotes Justice White from *United States v. Hale*, 422 U.S. 171 (1975) that due process is offended by the use of defendant's silence at trial. Justice Rehnquist and C.J. Burger concur, a minute extract from the prosecution's closing argument can be harmless error); *Burger v. Kemp*, 483 U.S. 776 (1987) (didn't actually need to apply harmless error); *Hitchcock v. Dugger*, 481 U.S. 393, 399 (1987); *Teague v. Lane*, 489 U.S. 288 (1989) (issue not reached); *Harris v. Reed*, 489 U.S. 255 (1989) (implicit in remand); *Perry v. Leeke*, 488 U.S. 272, 278, 285 (1989) (Justice Stevens' opinion for court, dissent by Justice Marshall, joined by Justices Brennan and Blackmun).

1990s DECISIONS: Yates v. Evatt, 111 S.Ct. 1884, 1897, 114 L.Ed.2d 432 (1991) (on certiorari from habeas in state court, Justice Souter opinion for the court, Justice Scalia and Justice Blackmun concur); *Estelle v. McGuire*, 112 S.Ct. 475, 484, 116 L.Ed.2d 385 (1991) (Justice O'Connor and Stevens concur in part, dissenting in part); *Parker v. Dugger*, 111 S.Ct. 731, 738, 112 L.Ed. 812 (1991); *Stringer v. Black*, 112 S.Ct. 1130, 1137-40, 1145 (1992) (Justice Souter's dissent joined by Justice Thomas and Chief Justice Rehnquist discusses harmless error analysis as not required in sentencing case when no eighth amendment violation occurred.); *Wright v. West*, 112 S.Ct. 2482, 2493 (1992).

[14] "We must be mindful of the cannon that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *N.L.R.B. v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 177 (1981). Federal courts are charged with executing the federal habeas statutes.

B. Statutory Interpretation Cases such as *Chapman* Should be Given Particular Deference, Since Congress Can Overturn a Decision it Considers Incorrect, Unlike Constitutional Decisions

The active consideration by Congress of the standard of review involved in the case at bar has already been suggested at Petitioner's Brief pp. 18-28. The weight to be attributed to Congressional inaction regarding judicial construction of a federal statute depends upon a large number of factors, including the passage of time, implicit approval and related amendments. "Of course, the view of later Congresses does not establish definitively the meaning of an earlier enactment, but it does have persuasive value." *Bell v. New Jersey and Pennsylvania*, 461 U.S. 773, 784 (1983). Moreover, the nature of the expression of view by subsequent Congresses has weight.[15] However, "Where action upon a statute or practical and contemporaneous interpretation has been called to the legislature's attention, there is more reason to regard the failure of the legislature to change the interpretation as presumptive

---

[15] Even authorization of expenditures sometimes validates judicial interpretation. *Alaska S.S. Co. v. United States*, 290 U.S. 256, 262 (1933), see also *Manhattan Properties v. Irving Trust Co.*, 291 U.S. 320, 334-36 (1933) ("In this situation 'only compelling language in the statute itself would warrant the rejection of a construction so long and so generally accepted.' If the rule is to be changed, Congress should so declare." In 1976 Congress enacted this court's rules governing sections 2254 and 2255 cases with certain changes, including an addition to rules 8 (c) Pub.L. 94-426, 90 Stat. 1334. By then significant Congressional consideration of *Chapman* had already taken place (See Petitioner Br. pp. 19-20).

evidence of its correctness." Sutherland, *Statutory Construction*, (5th Ed.) Section 49.10, Vol. 2b, p. 76 (1992). Frankly, the appearance of Congressional acceptance of the harmless error test by Congressional leaders of both parties across the entire political spectrum is quite impressive. (Pet. Br. 27)

Moreover, the *Chapman* decision of 1967 is for all intents and purposes a contemporaneous interpretation of the 1966 amendments to the federal habeas corpus legislation, legislation which specifically addressed the weight to be given to certain state court determinations. "Long-continued contemporaneous and practical interpretation of a statute by the executive officers charged with its administration and enforcement, the courts, and the public constitutes an invaluable aid in determining the meaning of a doubtful statute." Sutherland, *Statutory Construction*, Sec. 49.03, Vol. 2b, p. 7.[16] "[C]onsiderations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this court's interpretation of its legislation." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977)[17]

---

[16] Silence for 21 years has evidenced Congressional approval. *United States v. Elgin, J. & E. Ry. Co.*, 298 U.S. 492, 500 (1936); *see also, Kelly v. Robinson*, 479 U.S. 36, 53 (1986).

[17] *See also, State of Missouri v. Ross*, 299 U.S. 72, 75 (1936), *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488-89 (1940), and *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979). "[T]he Congress is at liberty to correct our mistakes of statutory construction, unlike our constitutional interpretation, whenever it sees fit. The controlling principles were best stated by Mr. Justice Brandeis: 'Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . This is commonly true

The Harmless Error Standard

Wisconsin's brief at p. 32. n. 9, and the Solicitor General's brief at Part A of the Argument, display confusion about Petitioner's argument. It was stated at Petitioner's brief, p. 4, "This court should continue the harmless error standard on collateral review of state convictions. . . . " Petitioner's attorney was certainly unaware that any argument for "automatic reversal" was being made.

The *Chapman* harmless error standard *already* implicates a threshold decision. Neither de minimus constitutional error, nor constitutional error that the court judges could have had no material impact upon the jury determination are grounds for issuing the writ. Such threshold determination itself serves every legitimate interest in comity asserted by Wisconsin or amici. Moreover, the

---

even where the error is a matter of serious concern, provided correction can be had by legislation. . . .' *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-407 (1932) (dissenting opinion) (footnotes omitted)", *Monell v. Department of Social Services*, 436 U.S. 658, 714-715 (1978) (dissent by Justice Rehnquist joined by Chief Justice Burger) (citations omitted). *See also* Justice Stevens' opinion for the court in *Square D. Company v. Niagara Frontier Thrift Bureau, Inc.*, 476 U.S. 409, 424 (1986), which similarly cited Justice Brandeis as well as Levi, *An Introduction to Legal Reasoning*, 15 U.Chi.L.Rev. 501, 540 (1948): "The doctrine of finality for prior decisions setting the course of the interpretation of a statute is not always followed . . . Nevertheless, the doctrine remains as more than descriptive. More than any other doctrine in the field of precedent, it has served to limit the freedom of the court. It marks an essential difference between statutory interpretation on the one hand and case law and constitutional interpretation on the other."

harmless error threshold determination displays appropriate deference to the uncertainty attendant upon jury determinations while recognizing that even some CONSTITUTIONAL errors have little or no impact upon seriously contested issues.

Were evidence cited of wholesale overturnings of state convictions by application of the *Chapman* standard on collateral review, the hyperbole that habeas reviews "frustrat[e] both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights," (Solicitor General's Br. p. 13, quoting, *Murray v. Carrier*, 477 U.S. 478, 487 (1986)) might be more appropriate.[18] The authorities cited by Wisconsin and amici contain neither empirical evidence refuting the psychological studies discussed in Petitioner's Brief pp. 28-36, nor empirical evidence that *Chapman* has not worked. The only "empirical evidence" mentioned by any authority is a 1938 survey by an ABA committee of the opinions of judges in five states on permitting adverse comment on the defendants' failure to testify.[19] That is a pretty thin reed for overturning a quarter century of precedent. Besides tangential remarks at Wisconsin Br. p. 32, n. 9, the empirical studies cited by Petitioner remain unchallenged.

---

[18] "The process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency." Justice Frankfurter for the court in *New York v. United States*, 326 U.S. 572, 583 (1946).

[19] Report to the Attorney General on Adverse Inferences From Silence, 22 U. Mich. J. of Law Reform 1005, 1070 (1989).

The problem illustrated by such empirical studies, and the application of the *Chapman* harmless error test in the case at bar, is that once a determination is made that the harmless error threshold has been passed, the court has determined that some impact may have occurred on the jury deliberation and decision, but the court's ability to quantify that impact is non-existent. When determination of guilt depends on determination of intent, to sanction the little bit of poison the Wisconsin special prosecutor injected into the trial, virtually eliminates the Fifth Amendment protection against self incrimination from all criminal trials involving intent. To presume that the limited number of cases this court takes on direct review will effectively deter the actions of prosecutors in thousands of cases a week begs reality. (Pet. Br. 43) Indeed, the possibility that serious review may occur in federal courts may be more important in ensuring that state courts fairly apply *Chapman* than actual review in federal court. Maintaining parallel standards in this instance also facilitates federal court review for the state court analysis will directly assist the federal habeas court while strengthening direct *Chapman* review.

While inferences such as those incorporated in the Statements of the Case for the Solicitor General and Wisconsin might be powerful arguments to a jury, the examples discussed supra in notes 4-6 highlight the importance of jury inferences, for only it is charged with final power to make inferences in criminal cases. Which inferences are actually adopted is usually a matter of pure speculation. To then speak of the "probative value of silence" (Wisconsin Br. 30), is to ignore Fifth Amendment text. Confessions extracted by rack and screw also have

"probative value," but the Fifth Amendment bars their use, even if the screw is only turned a couple of times. The inferences that Wisconsin suggests are appropriate on habeas (although inappropriate on direct appeal, Wisconsin Br. 34) employ compulsion within the meaning of the Fifth Amendment. It might be different if accidental use of post *Miranda* silence by the prosecutor was all that was involved. No appellation of "accidental use" can possibly apply to the central theme of the special prosecutor throughout the trial. Throughout trial, Brecht's "silence" was the keystone of the prosecution case. The fact of the matter is that the prosecutor didn't much care when Brecht was silent, he was going to use his silence for all it was worth. In the spirit of David Glasgow Farragut, it was "Damn the torpedoes [of the law], full speed ahead."[20] Only by ignoring the central thrust of the special prosecutor's closing arguments can these serious errors of law be found harmless (or indeed, even fail the *Kotteakos* test).

Empirical psychological studies suggest difficulties inherent in judicial review tainted by factors such as hindsight and outcome bias, and suggest enormous difficulties in making such findings as whether "error had a substantial and injurious effect on the outcome of the

---

[20] Wisconsin's brief p. 8, n.3 ascribes confusion to the district court about one *Doyle* violation. However, the Wisconsin Court of Appeals made no such distinction, Jt. App. 42; and neither the Wisconsin Supreme Court, see Jt. App. 65-66, nor the Seventh Circuit, Jt. App. 109, made *any* finding on the matter. If the district court had difficulty making such a distinction, it is patently obvious that a jury of twelve citizens would be completely unable to master any difference.

case" (Solicitor General brief, p. 8). This is particularly the case when the constitutional error is the linchpin of the prosecution's case, as here.

The government's lever to move the jury to its view on intent was a lever it called "total lack of credibility" (Tr. 608, 619, 791); the lever's fulcrum was Brecht's failure to label the shooting an accident prior to hearing the government's case at trial (despite opening argument by the defense attorney disclosing the defense in considerable detail), and the heaviest weight on that lever was a congeries of inferences, surmises and theories, most based upon Todd Brecht's admitted homosexuality. (Jt. App. 137) This case is all about such inferences, many cases are not. The Wisconsin Supreme Court finding of trial error in barring testimony of Brecht's non assaultive, non-violent character (Jt. App. 72-73), while beyond this court's certiorari grant, is part of the background for the issue before the court. A person who has never before resorted to violence, but who has often resorted to flight, was portrayed by the prosecution as a cool, calculating, criminal, one who would profit from his sister's inheritance. Whether that depiction is correct, is an issue a jury should decide. We submit that a trial with serious constitutional error that directly impacts upon the jury fact-finding of intent, cannot in this case be denominated harmless error, and represents a fundamental deprivation of due process.

Moreover, the instant case illustrates that guilt or innocence is in many cases directly implicated by *Doyle* violations. *Doyle* violations can, as they did in this case, go directly to the heart of the case. Such cases are not

about technical errors, or constables blundering, they are about detention *simpliciter*.

Wisconsin's suggestion that the cost of applying *Chapman* would be great, and the additional protection minimal (Wisconsin Br. 35), cites no empirical support, and simply ignores a quarter century of federal court practice. With all due respect, that argument has been raised in Congress, and is now brought here because Congress has not yet found it persuasive.

Nor do Wisconsin and amici address the conundrum that the suggested standard may be more of a problem than a solution. (Pet. Br. 44-45) The need to change something that has worked for so long, been ratified through repeated and substantial Congressional consideration, by a standard developed for direct appeal (which assumes complete review of a trial record) is quite unclear.[21]

The exaggerated claim that "habeas corpus can be a rerun of the state appellate process" (Wisconsin Br. 30) is absurd. The procedural complexities of habeas corpus, the limited nature of questions that can *ever* be considered, and the harmless error test itself, all constitute guarantees that such a fear cannot come to pass. Moreover, neither Wisconsin nor amici seriously attempt to demonstrate it has come to pass. The parade of evils Wisconsin and amici conjure up simply have not opened many prison doors. Yet for those who are innocent, the right to the Great Writ remains critical.

---

[21] "Much time would be lost in reviewing legal and factual issues that the state court is better suited to address expeditiously." *Harris v. Reed*, 489 U.S. 255, 264-265, and n.12 (1989).

Conclusion

Wherefore, petitioner prays for the relief stated in his initial brief.

Respectfully submitted,

/s/ Allen E. Shoenberger
Court Appointed Counsel